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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

LOCAL UNION 1702, UNITED MINE WORKERS OF AMERICA,
Petitioner,

v.

CONSOLIDATION COAL COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Is a local union liable in damages for an unauthorized strike, in violation of a collective bargaining agreement, on the theory that it is responsible for the "mass action" of its members, in the absence of any findings by the trier of fact that the union authorized, participated in, or encouraged the unauthorized strike?

2. Is a local union liable in damages for breach of a collective bargaining agreement upon a finding that it failed to employ certain specific measures to suppress an unauthorized strike, where the parties to the collective bargaining agreement purposefully decided not to impose on the union an obligation to take disciplinary or other action to get unauthorized strikers back to work?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-____

LOCAL UNION 1702, UNITED MINE WORKERS OF AMERICA,
Petitioner,

v.

CONSOLIDATION COAL COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Local Union 1702, United Mine Workers of America, prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on June 9, 1983.

I. OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 709 F.2d 882 (1983). It is appended to this petition as Appendix A. The decision of the District Court for the Northern District of West Virginia is not published in the Federal Reporter but is reported at 110 L.R.R.M. 2907 and is appended to this petition as Appendix B.

II. JURISDICTION

The judgment of the Fourth Circuit was entered on June 9, 1983. Petitioner's timely petition for rehearing *en*

banc was denied on July 29, 1983, and this petition was filed within sixty days of that date. The Order is appended to this Petition as Appendix C. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

III. STATUTE INVOLVED

This case involves Section 301 of the Labor Management Relations Act of 1947 (LMRA), 61 Stat. 156, 29 U.S.C. § 185, printed in the Appendix as App. D.

IV. STATEMENT OF THE CASE

The Consolidation Coal Company (Consol) brought this action under Section 301 of the LMRA against Local Union 1702, United Mine Workers of America (Local 1702), to recover damages for breach of a collective bargaining agreement arising out of an unauthorized or wildcat strike of approximately 400 employees, which began at 12:01 a.m. on Friday, January 30, 1981, and continued until 12:01 a.m. on Wednesday, February 4, 1981.[1]

The grievance that gave rise to the work stoppage was Consol's suspension, with intent to discharge, of employee John Anderson. Such grievance was subject to settlement by the grievance machinery provided for in the collective bargaining agreement between Consol and the United Mine Workers of America. After Consol suspended Anderson, Consol's representative held meetings with the Local 1702 Mine Grievance Committee and, under the terms of the Agreement covering discharges, Anderson and the Mine Grievance Committee met with the Mine Superintendent on Friday morning, January 30,

[1] Thus, Consol lost nine scheduled production shifts, namely three on Friday, January 30; three on Monday, February 2; and three on Tuesday, February 3.

and, failing to resolve the dispute, arranged for accelerated arbitration.

Consol filed its complaint on the day the strike commenced, Friday, Jan 30, 1981. That very afternoon, the District Court issued a Temporary Restraining Order, restraining Local 1702, its officers and members from engaging in the strike and ordered the officers to take reasonable steps to end the work stoppage. The Temporary Restraining Order was served on the officers on Saturday, January 31. At a Local Union meeting, advertised by radio, on February 1, the officers of the Local explained the temporary restraining order then in effect and instructed the members to return to work. The officers went to work at the beginning of their regularly scheduled shifts of work during the stoppage, except when they reported off for union business, and they urged the employees to return to work. The union business consisted of the calling of the Local meeting, the investigation and preparation of the Anderson grievance, the arbitration hearing originally scheduled for February 3, 1981, and a contempt hearing conducted on February 3, 1981.[2]

At the beginning of the damage action trial before the Court, Judge William M. Kidd presiding, Consol dis-

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[2] The District Court found the Local, its officers, committeemen, and members in civil contempt for willfully violating the January 30 TRO by not taking "reasonable steps in a bona fide effort to cause the members of Local 1702 . . . to return to work," and the Court found the Local liable in contempt by virture of the mass action of its members. The Local, its officers, and committee appealed, and the finding of civil contempt was affirmed by the Fourth Circuit on the grounds that the Local officials had been ordered to use reasonable efforts to try to end the strike and, since their efforts had been ineffective, they chose not to use other means such as telephone calls and threats of discipline. *Consolidation Coal Co.* v. *Local 1702, etc.*,

missed its complaint against the officers and the mine committee and proceeded against the Local.

The District Court found for the Local and dismissed the complaint. The District Court found that the "mass action" theory of liability is no longer viable and that the union's responsibility must be established "according to the common-law rule of agency. *Carbon Fuel Co.* v. *UMWA, et al.*, 444 U.S. 212 (1979). . . ." *Consolidation Coal Co.* v. *Local 1702*, 110 L.R.R.M. 2907, 2910 (N.D. W.Va. 1982), App. B, p. 11a.

The District Court factually determined that:

> ". . . the weight of the evidence does not demonstrate that the defendant Local, acting by and through its officers and committeemen, instigated, supported, ratified or encouraged the work stoppage. Efforts were made to encourage the miners to return to work; those efforts were hampered somewhat by the involvement of the officers and committeemen in the 24-48 hour meeting on January 30, 1981, the investigation and preparation of the Anderson grievance, the arbitration initially scheduled for February 3, 1981, and actually concluded on February 4, 1981, the contempt hearing conducted before Judge Haden on February 3, 1981, and the short duration of the actual stoppage." App. B, Findings of Fact, #19., p. 16a.

The District Court also rejected Consol's contention that the integrity clause of the contract should be construed as imposing upon the defendant Local an obligation to take disciplinary action to force unauthorized

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683 F.2d 827, 831 (4th Cir. 1982). In view of this Court's decision in *Carbon Fuel Corp.* v. *UMWA, et al.*, 444 U.S. 212 (1979), the Fourth Circuit stated it expressed no opinion on the continued validity of the mass action theory of union liability in the Fourth Circuit after *Carbon Fuel. Consolidation Coal Co., supra* at 832, n.6.

strikers to return to work, citing *Carbon Fuel, supra.* App. B, Conclusions of Law, # 6, p. 17a.

On appeal, the Fourth Circuit reversed the District Court and remanded the case for appropriate findings on the amount of damages Consol is entitled to recover. The Fourth Circuit held that the common-law rule of liability, as found in the decision of this Court in *Carbon Fuel,* applied only to International Unions and District Unions and did not address the application of the "mass action" theory of responsibility to local unions. The Fourth Circuit reiterated its statement in *Carbon Fuel* that the "mass action" theory represents a sensible and pragmatic approach to this difficult problem and found Local 1702 liable under the "mass action" theory, because all members of the defendant Local, as well as all officers and mine committeemen, participated in the work stoppage.

The Fourth Circuit further held the District Court's finding of a lack of ratification and encouragement by the Local's officers is clearly erroneous and, therefore, the Local was liable under common-law agency theory in that, (1) the officers never returned to work themselves; (2) union officials never used television, radio, newspapers, telegrams, letters or telephones in an attempt to persuade miners to return to work; and (3) union officials never threatened any members with discipline for failure to work. The Fourth Circuit reasoned that the officers' persuasive efforts to end the strike were "foreseeably ineffective" and such lack of effort compelled it to conclude "that the local union ratified and encouraged the strike and is, accordingly, liable under common-law agency theory for damages. . . ." *Consolidation Coal Co.* v. *UMW Local 1702,* 709 F.2d 882, 886 (4th Cir. 1983), App. A, p. 8a.

V. REASONS FOR GRANTING THE WRIT

A. The Decision Below Is Contrary To The Decisions Of This Court And Is In Direct Conflict With Decisions Of Other Courts Of Appeals

1. The "mass action" theory

The Fourth Circuit found that the Local was liable in damages for the "wildcat" strike on the "mass action" theory of responsibility and defines the rule that "as long as a union is functioning as a union it must be held responsible for the mass action of its members. *United States* v. *International Union, UMWA*, 77 F.Supp. 563 (D.D.C. 1948)." 709 F.2d at 885, App. A, p. 5a. This holding is in full comport with its decision in *Carbon Fuel Co.* v. *UMWA*, 582 F.2d 1346 (4th Cir. 1978).

The Fourth Circuit herein rejected the District Court's interpretation of this Court's determination in *Carbon Fuel* that, "Congress limited the responsibility of unions for strikes in breach of contract to cases when the union may be found responsible according to the common-law rule of agency." *Carbon Fuel Co.* v. *UMWA*, 444 U.S. 212, 216 (1979).[3] The Fourth Circuit rejected the contention that this Court's application of the common-law rule announced in *Carbon Fuel* did not depend upon the level of union hierarchy involved and did not construe the rule announced in *Carbon Fuel* to include Local Unions, but that it applied only to International and District Unions. This distinction is not justified because *Carbon Fuel* determined that, "the legislative history is clear that Congress limited the responsibility of unions for strikes in breach of contract to cases when the union may be found

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[3] In *Carbon Fuel*, the Local Union did not seek certiorari and, therefore, the Fourth Circuit's application of the "mass action" theory was not reviewed by this Court.

responsible according to the common-law rule of agency." *Carbon Fuel, supra* at 216. No distinction was made between International, Districts and Locals.

The Fourth Circuit's decision is not only in conflict with *Carbon Fuel*, but also with the decisions of the Sixth Circuit, the Eleventh Circuit, the Third Circuit, and the Fifth Circuit.

In *Peabody Coal Co.* v. *Local Unions, 1734, 1508, 1548, UMWA*, 543 F.2d 10, 12 (6th Cir. 1976), the Sixth Circuit stated, "There is no precedent in this circuit to support the contention that the 'mass action' of union members is, in and of itself, sufficient to bind the Union."

The Sixth Circuit rule is that, "unions may only be held responsible for the authorized or ratified actions of its officers and agents." *North American Coal Corp.* v. *Local 2262, UMWA*, 497 F.2d 459, 466-67 (6th Cir. 1974). In *United Steelworkers of America, et al.*, v. *Lorain, a Division of Koehring Co.*, 616 F.2d 919 (6th Cir. 1980), the Sixth Circuit affirmed the District Court's judgment in favor of the International Union and the Local for a wildcat strike on the grounds that they did not authorize, participate in, or ratify the strike.

The Fourth Circuit's decision is in conflict with the decision of the Eleventh Circuit in *North River Energy Corp.* v. *UMWA*, 664 F.2d 1184 (11th Cir. 1981).[4] Therein, the Eleventh Circuit affirmed a judgment assessing damages against a local union for one strike and denying liability as to six other strikes. In affirming the damage judgment, the Eleventh Circuit found that the local au-

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[4] The Fourth Circuit erroneously states that the Eleventh Circuit in *North River* "simply assumed, without discussing the effect of *Carbon Fuel*, that the mass action theory still applied to local unions." 709 F.2d at 885, n.4., App. A, p. 6a.

thorized the strike by meeting and authorizing the president to send a mailgram (paid for by the local) to the employer stating that the employees were holding the Company liable for losses resulting from the work stoppage. The Eleventh Circuit found the mailgram was a product of the union functioning as a union and thus it ratified the strike. Also, the local's officers told the Company that the men would return to work but only if and when the notices were taken down. (The posted notices were the basis for the grievance.) As to the remaining six strikes, the Eleventh Circuit refused to apply the "mass action" theory to find the local liable. The Eleventh Circuit defined the "mass action" theory as when the membership acts in concert as an entity and, in the six strikes, it found that there was little evidence that the local was functioning as an entity. "Rather, the evidence is equally susceptible of an interpretation that the individual union members were engaged in an adventure of their own." *North River, Id.* at 1194. Thus, the Eleventh Circuit does not follow the vicarious liability "mass action" theory as defined by the Fourth Circuit.

The Fourth Circuit applies the theory that if the union's membership or most of it goes on strike, then the entity is liable. In defining the rule, it misreads *United States* v. *International Union, UMWA, supra.* That case did not find UMWA liable in contempt because its members did not return to work after the District Court issued a temporary restraining order ordering the UMWA to cease striking. What the District Court found was that the UMWA had authorized the strike by a letter sent by the International President to all UMWA members, which was interpreted by the District Court as a nod, or a wink, or a code to strike. UMWA defended the contempt citation by asserting that it had not authorized the strike and that the work stoppage was the individual action of the

members. The District Court stated, "The idea of suggesting that from 350,000 to 450,000 men would all get the same idea at once, independently of leadership, and walk out of the mines, is of course simply ridiculous." The conviction was upheld by the Court of Appeals on the ground that, "the Union was not convicted for causing the walk-out" but for disobeying a court order to take action to end it. *UMWA* v. *United States*, 177 F.2d 29, 36 (D.C. Cir. 1949), *cert. denied*, 338 U.S. 871 (1949). The same District Court, in a similar contempt case, *United States* v. *International Union, UMWA*, 89 F.Supp. 179 (D.D.C. 1950), found the UMWA not guilty of contempt, even though its members continued on strike after the District Court had issued a temporary restraining order. The District Court found that the UMWA had complied with the injunction by ordering the membership back to work. The "mass action" of its members in not heeding that order did not make the UMWA liable for their conduct.

The Fourth Circuit's vicarious liability theory is in conflict with the decisions of the Third Circuit, although those decisions are not clear and are somewhat inconsistent. Often cited as a leading case supporting the "mass action" theory of liability is *Eazor Express, Inc.*, v. *International Brotherhood of Teamsters*, 520 F.2d 951 (3d Cir. 1975), *cert. denied*, 424 U.S. 935, *rehearing denied*, 425 U.S. 908 (1976). In *Eazor Express*, the Third Circuit affirmed a judgment against the International Union and the Local Union for the violation of a specific no-strike clause on the grounds that such a clause implied an obligation "to use every reasonable means to bring to an end a strike begun by their members without their authorization," (*Id.* at 959) and that the contract specified that, "While the union shall undertake every reasonable means to induce such employees to return to their jobs during any such period of unauthorized stoppage of work

mentioned above," the employer shall have the sole and complete right of reasonable discipline short of discharge. The Third Circuit stated that, "It was the breach of this obligation by the unions, not any responsibility for the particular unauthorized actions of their members, which generated liability on their part." (*Id.* at 962) The Third Circuit then stated that there was an additional basis for holding the union liable—the so-called "mass action" theory—that "mass action" by union members must be regarded as union action. Actually, the Third Circuit affirmed the judgment on the grounds that the unions had not taken reasonable means to end the strike (*Id.* at 964) and found liability arose 48 hours after the inception of the strike—the 48 hours time limit to take reasonable means to terminate the strike. However, in an appeal from an order granting a preliminary injunction enforcing an implied no-strike clause, the Third Circuit in *U.S. Steel Corp.* v. *UMWA*, 534 F.2d 1063 (3d Cir. 1976), clarified its approval in *Eazor Express* of the "mass action" theory. The Court said:

> "Although the mass-action theory approaches the question of union liability on a different tack, it does not enlarge the scope of that liability beyond the boundaries described by the implied 'all reasonable efforts' obligation" to end the strike. (*Id.* at 1074)

Circuit Judge Gibbons stated that, contrary to Circuit Judge Rosenn:

> "I do not believe that the mass-action theory creates strict union liability for the conduct of the membership before or at the inception of the strike. The carefully-crafted "all reasonable efforts" obligation of *Eazor Express* comes into operation by virtue of the membership mass action. But exposing even the local union to absolute liability . . ., irrespective of the strength of the officers' efforts to dissuade the membership from engaging in prohibited conduct,

was not the intended result of *Eazor Express*." (*Id.* at 1074)

Judge Rosenn, concurring, stated that in his view the "mass action" theory did not impose liability independent of the collective bargaining agreement. When the union has an obligation not to strike and substantially all the members of the union do strike, the breach of the contractual obligation is imputed to the union. (*Id.* at 1080) Chief Judge Seitz (concurring and dissenting) agreed with Judge Gibbons that an injunction should have issued, but disagreed as to including the District and International Unions. (*Id.* at 1084)

In an opinion on a petition for rehearing *en banc* by the unions, the Third Circuit noted that the issues are exceptionally important and controversial and that the panel had divided three ways but it decided that only the Supreme Court could decide these issues and, since a petition for certiorari to review a decision in *U.S. Steel Corp.* v. *UMWA*, 519 F.2d 1236 (5th Cir. 1975), had been filed, it preferred to take no steps that might delay that petition, so it denied the petition for rehearing, *U.S. Steel Corp.* v. *UMWA*, 534 F.2d 1063, 1084-85 (3d Cir. 1976).[5]

The Third Circuit affirmed, without opinion, the District Court's decision in *Airco Speer Carbon-Graphite* v. *Local 502, International Union of Electrical, Radio & Machine Workers of America*, 494 F.Supp. 872 (W.D. Pa. 1980), *aff'd*, 108 L.R.R.M. 2816 (3d Cir. 1981). In *Airco Speer*, the Third Circuit had remanded the case to the District Court to specifically determine the impact of *Carbon Fuel*, *supra*, on the local union's liability for a wildcat strike. The District Court states that, "The mass

[5] However, the petition for certiorari was denied, *UMWA* v. *U.S. Steel Corp.*, 428 U.S. 910 (1976).

action theory does not survive *Carbon Fuel*" and, therefore, could not form the basis of the local's liability. (*Id.* at 876) The Third Circuit's affirmance under the circumstances clearly indicates that the "mass action" theory will no longer be applied in the Third Circuit.

The Fifth Circuit rejected the "mass action" theory in *U.S. Steel Corp.* v. *UMWA*, 519 F.2d 1249, 1253 (5th Cir. 1975), stating:

> "The fact that the strike took place is not sufficient in itself to raise the presumption that the union, as an entity separate from its members, is responsible. No federal appellate court case has held unions to the high standard of vicarious liability here urged by United States Steel. Clearly, a union is not responsible for an unauthorized strike which the union officials are endeavoring to stop." *Id.* at 1253.

The Fifth Circuit first raised its "mass action" theory in *Vulcan Materials Co.* v. *United Steelworkers*, 430 F.2d 446 (5th Cir. 1970), *cert. denied*, 401 U.S. 963 (1971), by stating that, "Read in context, it is clear that the Court was not laying down a per se rule that a union is liable any time its members go on strike. In that case, the union was 'functioning as a union.' " *Id.* at 1253.

2. The Fourth Circuit's common-law agency theory

The Fourth Circuit's opinion rejects this Court's decision that the collective bargaining history in the coal industry negates any obligation to use "all reasonable means" to prevent or terminate wildcat strikes. *Carbon Fuel Co.* v. *UMWA, et al.*, 444 U.S. 212 (1979). Herein, the Fourth Circuit reversed the District Court's finding for the Local because of the lack of effort of the officers to return the strikers to work, even though (1) the officers appeared in the bathhouse at the beginning of their regularly scheduled shifts and encouraged them to return

to work, and (2) at a called meeting of the Local, the officers instructed them to return to work. The Fourth Circuit, after noting the action taken by the officers to terminate the strike, listed three actions not taken, (1) officers never returned to work themselves; (2) officers never used television, radio, newspapers, telegrams, letters or telephone in an attempt to persuade miners to return to work; and (3) officers never threatened any members with discipline for failure to work.

This so-called common-law agency rule conflicts with the decision of the Sixth Circuit in *Southern Ohio Coal Co.* v. *UMWA*, 551 F.2d 695 (6th Cir. 1977); *United Steelworkers of America, et al.*, v. *Lorain, supra.* In *Lorain*, the Sixth Circuit found it improper to impose a duty to use best efforts to end a strike, in the absence of specific contractual language so requiring. *Lorain, supra* at 923. And in *Penn Packing Co., Inc.*, v. *Amalgamated Meat Cutters, Local 195*, 497 F.2d 888 (3d Cir. 1974), the Third Circuit found that a contractual provision guaranteeing there would be no strikes did not give rise to a no-fault duty of indemnity on the part of the union. The Third Circuit did find that such contractual language did give rise to a union best efforts obligation to end the stoppage and that the Local officers satisfied that obligation by pleas to members to end the strike. No liability was imposed on the Local on either the "mass action" theory or the common-law rule as applied by the Fourth Circuit's lack of effort rule. The Ninth Circuit in *California Trucking Association* v. *Brotherhood of Teamsters*, 679 F.2d 1275 (1981), follows the Sixth Circuit's rule. In rejecting liability of a local union because it had failed to make a good faith effort to return employees to work, the Ninth Circuit said. "Local 70 would be liable for failure to institute all reasonable means to abate stoppages *only where the agreement specifically provided such a respon-*

sibility or where it had actively encouraged the stoppage. Carbon Fuel Co., 444 U.S. at 216-18, ..." at 679 F.2d 1275, 1287 n.17, *cert. denied*, 74 L.Ed.2d 281, 103 S.Ct. 299 (1982). No court, other than the Fourth Circuit, has drawn a best efforts or reasonable efforts obligation from the common-law agency rule, but such finding was drawn from a contractual obligation.

This Court granted certiorari in *Carbon Fuel* because the Fourth Circuit's holding in *Carbon Fuel, supra*, that the International Union and its Districts are not liable for not using all reasonable means, conflicted with the Third Circuit's decision in *Eazor Express, supra*.

What the Fourth Circuit did in the instant case was to ignore that the collective bargaining history between the parties negated any implied duty to use "reasonable means" or "best efforts through available disciplinary measures" to terminate unauthorized strikes, as set forth in this Court's decision in *Carbon Fuel, supra*, but it achieved the same result by finding the Local liable under the theory that the officers' failure to take other means to end the strike ratified and encouraged the strike. The Fourth Circuit's "lack of effort" rule is just another way of stating the "best efforts" or "reasonable means" rule.

An examination of the type of action the Fourth Circuit found the officers of the Local should have taken does not constitute ratification of the strike, nor is it evidence of the members' belief that lack of action signified approval by the officers of the strike.

The Fourth Circuit asserts that the officers should have worked themselves. This ignores the fact that: (1) the mine could not work with such a complement of men; (2) the District Court's finding that the officers were engaged in preparing for and processing the grievance, as required by the collective bargaining contract; (3) the

officers' time was spent in Local meetings or at the mine site at the beginning of each scheduled shift, urging the miners to return to their jobs, and (4) the short duration of the strike.

The Fourth Circuit relies upon the fact that the Local did not use the news media or telephone or write to urge its 400 members to return to work. How this could be construed as ratification is not known. There is no evidence that the miners did not know that the officers had urged and instructed them to work or that any such an appeal would have had any effect.

The Fourth Circuit also found that the officers should have threatened to discipline the members for failure to work. There is no basis for implying or concluding that such a threat would have been effective or that discipline was readily available to it, because federal law and the UMWA Constitution circumscribe discipline of union members. Both require a trial based upon written charges.[6] The UMWA Constitution requires that such charges be tried before a panel of fifteen (15) members of the Local. Common sense foretells that these members would not discipline one another and the members knew

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[6] Section 101(a)(5) of the Labor-Management Reporting and Disclosure Act gives a union member a federal right to written specific charges, reasonable time to prepare, and a full and fair hearing, before a union may use discipline. 29 U.S.C. § 411(a)(5). Article 15 of the UMWA Constitution provides that any charges against a member must be written charges duly sworn to and attested by a notary public and the member notified of the charges by certified mail. The charges are tried by a Trial Committee selected by lot from the full membership of the Local, and any member so selected shall disqualify himself if the member has a relationship to any of the parties or events involved in the proceedings so as to interfere with his making a fair and impartial decision.

it. Again, the Fourth Circuit ignores the fact that the disciplining clause was negotiated out of the Agreement.[7]

Since Local 1702 is a party to the same collective bargaining agreement as the International Union and its Districts, it follows that their obligations are identical and in *Carbon Fuel, supra*, this Court said:

> "Because the union did not want to surrender its freedom to decide what measures to take or not to take in dealing with unauthorized strikes, it negotiated the deletion of the 'best efforts through available disciplinary measures' clause." *Carbon Fuel, supra*, 444 U.S. at 220.

This Court further found:

> "The inescapable conclusion to be drawn from their bargaining history is that, whatever the integrity clause may mean, the parties purposely decided not to impose on the union an obligation to take disciplinary or other actions to get unauthorized strikers back to work. It would do violence to the bargaining process and the national policy furthering free collective bargaining to impose by judicial implication a duty upon UMWA and District 17 that the parties in arm's-length bargaining first included and then purposely deleted." *Carbon Fuel Co.* v. *UMWA, et al.*, 444 U.S. 212, 221-22 (1979)

Also, this Court noted that two Courts of Appeals construed this contract as not imposing liability on the union for wildcat strikes "and as not requiring UMWA to

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[7] However, the employer does have the right and power to discipline its employees by discharge or other penalties.

take any action with regard to such strikes. *Lewis* v. *Benedict Coal Corp.*, 259 F.2d 346, 351 (6th Cir. 1958) (Stewart, J.), *aff'd by an equally divided Court*, 361 U.S. 459, 464. . . . (1960); *United Construction Workers* v. *Haislip Baking Co.*, 223 F.2d at 887."

B. The Decision Below, Imposing Liability Upon Local Unions For The Mass Actions Of Its Members And By Imposing A Duty To Use All Reasonable Steps To Terminate Unauthorized Strikes, Is An Important Question Of Federal Labor Law That Should Be Decided By This Court

The issue of liability of unions for unauthorized or wildcat strikes, an issue which had been the subject of numerous lawsuits, has been decided by this Court in *Carbon Fuel, supra*, wherein it was held that a union's responsibility must be established according to the common-law rule of agency and that federal labor law and the UMWA's collective bargaining agreement did not impose an obligation on the UMWA to use all reasonable means available to prevent or end the strikes. However, the Fourth Circuit's decision herein finds that this Court's decision does not apply to local unions. Instead, it imposes a strict rule of vicarious liability on local unions for the "mass action" of its members.

The Fourth Circuit's adoption of the "mass action" theory is not based upon the Congressional history of Section 301 of the Act, but the Fourth Circuit asserts that the theory, properly applied, represents a sensible and pragmatic approach to this difficult problem in the area of labor relations.

There are approximately 50,000 local unions in the United States. All, or most of these, are parties to a contract that either contains a specific or an implied no-

strike agreement. The imposition of vicarious liability on local unions could easily mean the crippling of such unions, if not mean the elimination of them. In *International Brotherhood of Electrical Workers* v. *Foust*, 442 U.S. 42 (1979), this Court repeated its concern that large damage awards could impose real hardships on unions and found considerations of deterrence insufficient to risk endangering the financial stability of such institutions, noting that awards of punitive damages could deplete union treasuries, "thereby impairing the effectiveness of unions as collective bargaining agents." *Id.* at 50-51. Faced with such an imposing threat to their existence, it is doubtful that locals would become a party to a contract unless its terms limited their liability in some fashion, such as an affirmative right to strike. Such a demand would have a tremendous impact on UMWA's future collective bargaining negotiations, as well as upon the bargaining in all other industries and businesses with collective bargaining contracts.

The Fourth Circuit's application of the common-law agency rule is an additional important question of federal labor law and is, in fact, in conflict with the decision of this Court in *Carbon Fuel*. Its effect is to impose on all local unions an obligation to take every means necessary to prevent or terminate wildcat strikes and the means would be judged, in terms of liability, by the success or failure of the action taken by local union officers. By this process, the judiciary would decide what efforts are the best; local officers would act at their peril. Such a standard of liability does violence to the common-law rule of agency and, rather than being a sensible and pragmatic approach to a difficult problem, it is harmful to the bargaining process, as it would encourage unions to take positive steps to contractually rid themselves of this liability. It is harmful to the national labor policy furthering free collective

bargaining, as it represents unwarranted judicial determination of contractual obligations of the parties. The Fourth Circuit's approach does not even find that the "lack of efforts" rule is a question to be left to the trier of the facts, but imposes liability as a matter of law.

The question of whether it is a sensible and pragmatic approach to require local union officers to separate themselves from their fellow members by working instead of trying to solve the problems at hand and making war on their fellow workers by the use of threats of disciplinary action is an important question of national labor policy that has not been, but should be, decided by this Court. The balancing of conflicting federal policies is too delicate in such complex situations to allow, without review, the Fourth Circuit's approach to stand. Its approach is the "free-wheeling" inquiry warned against in *Howard Johnson Co.* v. *Detroit Local Jt. Exec. Bd. Hotel Employees Union*, 417 U.S. 249, 255 (1974), wherein this Court said: "But *Lincoln Mills* did not envision any free-wheeling inquiry into what the federal courts might find to be the most desirable rule, irrespective of Congressional pronouncements." *Id.* at 255. Indeed, this Court, in its review of the collective bargaining contract at issue, has already expressly rejected the Fourth Circuit's "most desirable rule" that a duty be imposed upon the union to use "all reasonable means" to end wildcat strikes.

CONCLUSION

Wherefore, for all the reasons above asserted, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-1567

CONSOLIDATION COAL COMPANY, a corporation,
Appellant,

v.

LOCAL 1702 UNITED MINE WORKERS OF AMERICA: FREDDIE W. KELLEY, JR.; CHARLES R. FETTY; PAUL SMERDELL; JACK P. CHRISTOFF and RICHARD A. ROBERTS,
Appellees.

Appeal From The United States District Court For The Northern District Of West Virginia, At Elkins.
William M. Kidd, District Judge.

Argued: January 13, 1983 Decided: June 9, 1983

Before RUSSELL and CHAPMAN, Circuit Judges and HAYNSWORTH, Senior Circuit Judge.

Robert M. Steptoe, Jr. (C. David Morrison, Steptoe & Johnson on brief) for Appellant; C. Patrick Carrick (Ross Maruka on brief) for Appellee.

CHAPMAN, Circuit Judge:

Consolidation Coal Company appeals from the order of the district court holding that it is not entitled to recover damages against the defendant local union for an illegal work stoppage participated in by the entire membership of the local union. The district court found that the "mass action" theory of union

liability is no longer a viable theory, even on the local level, and that the local union could not be held liable for the work stoppage under common-law agency principles. For the reasons which follow, we find that the "mass action" theory is still applicable to local unions and that the actions of the union officers and committeemen in this case were sufficient to bind the union under common-law agency principles.

I

This action arose out of a "wildcat" strike at plaintiff's Blacksville No. 2 Coal Mine in Monongalia County, West Virginia. The work stoppage began at 12:01 A.M. Friday, January 30, 1981 and continued until 12:01 A.M. Wednesday, February 4.

The reason for the work stoppage was the suspension of a union member who had allegedly attempted to remove company property from the mine between 6:00 and 8:00 A.M. Thursday, January 29.[1] The district court found that the strike was solely over an issue subject to arbitration under the parties' collective bargaining agreement and was, therefore, a breach of the contract by the members, officers and mine committeemen of the defendant local and the defendant local itself.

On the afternoon of January 30, the district court issued a temporary restraining order directing the officers, committeemen and members of Local 1702 to return to work. Four days later, on Tuesday, February 3, 1981, the district court held Local 1702, its officers, committeemen and members in civil contempt for willfully violating the January 30 restraining order and assessed civil contempt fines against all the

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[1] The accused employee, John Anderson, was suspended by the company with intent to discharge pursuant to the parties' collective bargaining agreement. The dispute over Anderson's discharge was submitted to arbitration after the strike was over and Anderson was returned to work with full back pay.

defendants.[2] Union members returned to work at the 12:01 A.M. shift February 4, 1981.

Although the district court found that the officers and committeemen took certain steps to end the work stoppage, it also found there were a number of steps the officials did not take. The officers and committeemen did go to the mine bathhouse at the beginning of their regularly scheduled shifts and encouraged their fellow miners to return to work; however, the union officials were dressed for work only on some of these shifts and never left the bathhouse to actually lead the miners into the mine.

Further, the union officials did arrange a meeting of the local for Sunday, February 1, 1981, at which time they instructed the miners to return to work but no motion to return to work was offered or voted upon. The union officials never arranged for television or radio broadcasts or newspaper advertisements instructing the union members to return to work. The officials never employed telegrams, letters or telephone messages to instruct the members to return to work; nor did union officials ever threaten any members with discipline for failure to work. The officers and committeemen did not set an example by themselves returning to work although work was available.

II

Section 301 of the Labor Management Relations Act, 29 U.S.C. § 1985 (1976), authorizes an action for damages against a local union for an illegal work stoppage. Before a local union, or any union, can be found liable for such damages, the union's

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[2] The district court later reduced the fines against the local and the officers and committeemen and remitted totally the fines assessed against individual members of Local 1702. This court upheld the decision of the district court in *Consolidation Coal Co. v. Local 1702, UMWA*, 683 F.2d 827 (4th Cir. 1982). Our earlier decision left open the question of whether the mass action theory is still viable as a basis for local union liability. pg. 832.

responsibility for the work stoppage must be established according to some recognized theory of liability.

The two recognized theories of local union responsibility for an illegal work stoppage are the mass action theory, *Carbon Fuel Co.* v. *UMWA*, 582 F.2d 1346 (4th Cir. 1978), *aff'd on other grounds*, 444 U.S. 212 (1979), and common-law agency theory, *United States Steel Corp.* v. *UMWA, District 20*, 598 F.2d 363 (5th Cir. 1979).

The district court held that the mass action theory is no longer a viable theory of liability at any level of union organization as a result of the Supreme Court's decision in *Carbon Fuel Co.* v. *UMWA*, 444 U.S. 212 (1979). The district court's holding was based on the Supreme Court's language describing the effect of the legislative history of § 301 of the Labor Management Relations Act: "Congress limited the responsibility of unions for strike in breach of contract to cases when the union may be found responsible according to the common law rule of agency." *Id.* at 216.

Although the district court recognized that *Carbon Fuel* did not involve a judgment against a local union but only judgments against an international and a district union, it held that the applicability of the rule announced by the Supreme Court did not depend upon the level of union hierarchy involved. We cannot accept the district court's interpretation of *Carbon Fuel*.

The question addressed by the Supreme Court in *Carbon Fuel* was "whether an international union, which neither instigates, supports, ratifies, nor encourages 'wildcat' strikes engaged in by local unions . . ., may be held liable in damages to an affected employer if the union did not use all reasonable means available to it to prevent the strikes or bring about their termination." 444 U.S. at 213. The petitioner, Carbon Fuel Company, had obtained judgments against three local unions which had been affirmed in part by this court,[4] but review of

[4] Carbon Fuel Co. v. UMWA, 582 F.2d 1346 (4th Cir. 1978).

the judgments against the local unions was not sought in the Supreme Court. The question of local union liability for strikes in breach of contract was not before the Supreme Court in *Carbon Fuel* and we do not construe the holding of that case to address local union liability for illegal strikes.

The portion of our decision in *Carbon Fuel* which was not reviewed by the Supreme Court dealt with the application of the "mass action" theory of responsibility to local unions. *Carbon Fuel Co.* v. *UMWA*, 582 F.2d at 1349. We considered the responsibility of three local unions for thirty-one "wildcat" strikes which were concededly in violation of the collective bargaining agreements between the unions and Carbon Fuel Company and we concluded that the district court was correct in holding the local liable for the majority of those strikes on the basis of the mass action theory.

The mass action theory is defined by the rule "that as long as a union is functioning as a union it must be held responsible for the mass action of its members." *United States* v. *International Union, UMWA*, 77 F.Supp. 563 (D.D.C. 1948). In reaching the conclusion that the local unions in *Carbon Fuel* were responsible for the wildcat activity of their members we emphasized "the uncontradicted evidence that all the members of the defendant locals, including their officers, participated in the strikes." 582 F.2d at 1350. We also noted that responsibility for wildcat strikes under the mass action theory will ordinarily be limited to the local union because the local union is usually "the entity whose membership acts in concert." 582 F.2d at 1349, quoting *United States Steel Corp.* v. *UMWA*, 534 F.2d 1063, 1074 (3d Cir. 1976).

The Supreme Court in *Carbon Fuel* held that, in view of the collective bargaining history between the parties in that case, neither the international nor the district union was under an obligation to use "all reasonable means" to prevent or terminate wildcat strikes engaged in by local unions. There is nothing in the logic of that holding that prevents the application of

the mass action theory on the local level.[4] As we stated in *Carbon Fuel*, "the 'mass action' theory, properly applied, represents a sensible and pragmatic approach to this difficult problem in the area of labor relations." 582 F.2d at 1349-50.

In the present case, the district court found as a fact that "all . . . members of the defendant local, as well as all officers and mine committeemen of the defendant local" participated in the work stoppage. This establishes that everyone in the local union was involved and demonstrates that this was mass action by the entire membership.

III

The district court also concluded that there was insufficient evidence to find Local 1702 liable for the illegal work stoppage under common-law agency theory because there was insufficient evidence to demonstrate that the local authorized, instigated, supported, ratified or encouraged the illegal work stoppage. Consolidation Coal Company argues that this conclusion is erroneous because the district court failed to proper-

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[4] Only one court of appeals has considered the applicability of the mass action theory to local unions since the Supreme Court's decision in *Carbon Fuel*. *North River Energy Corp.* v. *UMWA*, 664 F.2d 1184 (11th Cir. 1981). *North River* simply assumed, without discussing the effect of *Carbon Fuel*, that the mass action theory still applied to local unions.

Four district courts have considered the application of the mass action theory to local unions since *Carbon Fuel*. Three courts have stated that the theory is still viable at the local level. *Dresser Industries* v. *United Steelworkers of America, Local 4601*, No. 81-627E (W.D.N.Y. August 5, 1981); *Encino Shirt Co.* v. *International Ladies' Garment Workers Union*, No. 73-W-5093-NE, (N.D. Ala. March 24, 1980); *Keebler Co.* v. *Local 492-A, Bakery Confectionery and Tobacco Workers International Union*, No. 80-0798 (E.D. Pa. March 6, 1980). One court has held that the mass action theory no longer applies at any level of union organization. *Airco Speer Carbon Graphite* v. *Local 502, International Union of Electrical, Radio and Machine Workers of America*, 494 F.Supp. 872 (W.D.Pa. 1980).

ly consider the local's lack of efforts to return the strikers to work as evidence of the union's ratification and encouragement of the strike.

A review of the evidence before the district court leads us to conclude that the court's finding of a lack of ratification and encouragement by the local union is clearly erroneous. Union officials took only two actions in an "attempt" to end the work stoppage: (1) officers and committeemen appeared in the bathhouse at the beginning of their regularly scheduled shifts and "encouraged" their fellow miners to return to work; and (2) union officials arranged a meeting of the local two days after the strike had begun and "instructed" the miners to return to work.

In contrast to these meager efforts to end the work stoppage is a long list of actions that were not taken: (1) union officials never returned to work themselves until they were held in contempt of court; (2) union officials never used television, radio, newspapers, telegrams, letters, or telephones in an attempt to persuade miners to return to work; and (3) union officials never threatened any members with discipline for failure to work. The constitution of UMWA and the bylaws of Local 1702 impose duties on local officials to enforce contracts, to take all measures necessary to end any unauthorized work stoppage and not to participate in any strike not authorized by the international union.

The efforts made by union officials to end the strike were "foreseeably ineffective." *United States Steel Corp.* v. *UMWA*, 598 F.2d 363, 366 (5th Cir. 1979) A local union's inaction in the face of an illegal work stoppage by all of its members may constitute ratification of the work stoppage "where the union's efforts to return strikers are so minimal that the union's approval or encouragement may be inferred." *United States Steel Corp.* v. *UMWA*, 598 at 365; *Airco Speer Carbon-Graphite* v. *Local 502, International Union of Electrical, Radio and Machine Workers of America*, 494 F.Supp. 872 (W.D. Pa. 1980)

The efforts taken by the union in the present case are very similar to the local union's efforts which the fifth circuit found to be "foreseeably ineffective" in *United States Steel Corp.* In *United States Steel Corp.*, local union officials appeared at the bathhouse at the beginning of one shift and instructed miners to return to work and officials held meetings on two consecutive days at which miners were instructed to end the strike. In fact, the efforts of the local in *United States Steel Corp.* appear to have been more extensive than the efforts taken in the present case.

The lack of efforts by Local 1702 to return its members to work compels us to conclude that the local union ratified and encouraged the strike and is, accordingly, liable under common-law agency theory for damages caused to Consolidation Coal Company by the illegal work stoppage.

Liability of a local union for unauthorized work stoppages under common-law agency theory may be founded upon a showing that the union in some way made itself a party to the illegal strike. *North River Energy Corp.* v. *UMWA*, 664 F.2d 1184 (11th Cir. 1981). With every member, including all officers and committeemen, engaged in the illegal strike, the union has made itself a part of the illegality. It may only act through its officers, committeemen and members; so if everyone of these is involved in the strike, then the union is also involved.

CONCLUSION

Based on our holdings that Local 1702 is liable for damages caused by the illegal work stoppage under both the mass action theory and common-law agency theory, we remand this case to the district court for appropriate findings on the amount of damages Consolidation Coal is entitled to recover.

REVERSED AND REMANDED.

APPENDIX B

U.S. DISTRICT COURT,
NORTHERN DISTRICT OF WEST VIRGINIA

CONSOLIDATION COAL COMPANY v. LOCAL 1702 UNITED MINE WORKERS OF AMERICA, *et al.*, No. 81-0005-C, June 10, 1982

Robert M. Steptoe, Jr. (Steptoe & Johnson on brief), Clarksburg, W. Va., for plaintiff.

Ross Maruka (C. Patrick Carrick, on brief), Fairmont, W. Va., for defendants.

Full Text of Opinion

KIDD, District Judge:—This is an action to recover damages for breach of a collective bargaining agreement allegedly arising out of an illegal work stoppage which began January 30, 1981, and ended on February 3, 1981. Jurisdiction is predicated upon Section 301 of the Labor Management Relations Act of 1947, as amended by the Labor Management Reporting Disclosure Act of 1959 (29 U.S.C. § 185).

Plaintiff Consolidation Coal Company (Consol) originally sought damages from the local union as well as the officers and committeemen of the local union in both their individual and official capacities. At the beginning of the trial to the Court, conducted on October 30, 1981, plaintiff announced that it no longer desired to pursue any claims against the officers or committeemen and accordingly the Court does hereby ORDER those claims dismissed. As to the remaining defendant, Local Union 1702, there is disagreement among the parties as to the appropriate legal standard to be followed by the Court in determining liability of a union for the breach of a collective bargaining agreement.

The plaintiff argues it is entitled to recover under the "mass action" theory of liability as formulated in United States v.

International Union, U.M.W. of A., 77 F.Supp. 563, 21 LRRM 2721 (D.C. 1948); alternatively, plaintiff argues it may recover under principles of common-law agency in that the alleged illegal strike was ratified by the local since the local's conduct was inconsistent with repudiation of the strike. The defendant local union argues that the latter theory of recovery is the only basis of recovery now available to plaintiff.

The "mass action" theory of responsibility has been recognized in the Fourth Circuit as being applicable to local unions when considering the responsibility of the local union for a wildcat strike. Carbon Fuel Co. v. United Mine Workers of America, 582 F.2d 1346, 1349-1350, 99 LRRM 2520 (4th Cir. 1978), aff'd 444 U.S. 212, 100 S.Ct. 410, 62 L.Ed.2d 394, 102 LRRM 3017 (1979). In so holding, Judge Field wrote:

> In our opinion, the "mass action" theory, properly applied, represents a sensible and pragmatic approach to this difficult problem in the area of labor relations. In view of the uncontradicted evidence that all of the members of the defendant Locals, including their officers, participated in the strikes, the theory was properly employed by the district court in placing responsibility upon the Locals. Accordingly, the judgments against the Locals growing out of these thirty-one work stoppages are affirmed.

582 F.2d at 1349-50. The judgments against the locals were not reviewed when the case was appealed to the Supreme Court. The Supreme Court did review the Fourth Circuit's action vacating judgments against the international and district unions and affirmed.

The Supreme Court rejected the company's arguments that the obligations of the international and district unions to use all reasonable means to prevent and end unauthorized strikes in violation of the collective bargaining agreement were either implied in law because the agreement contains an arbitration provision or because the contract provided that the parties "agree and affirm that they will maintain the integrity of this contract." Carbon Fuel, supra, 444 U.S. at 220, 100 S.Ct. at 415, 62 L.Ed.2d at 399. In Eazor Express, Inc. v. Teamsters,

520 F.2d 951, 89 LRRM 3177 (3d Cir. 1975), cert. denied, 424 U.S. 935, 96 S.Ct. 1149, 47 L.Ed.2d 342, 91 LRRM 2410 (1976), a similar contract provision was interpreted to require a union to use its "best efforts" to curtail an unauthorized strike. The Fourth Circuit declined to follow this rationale in Carbon Fuel, 582 F.2d at 1350, and the Supreme Court expressly overruled Eazor, (Carbon Fuel, supra, 444 U.S. at ____, 100 S.Ct at 413, 62 L.Ed.2d at ____), thus rejecting the best efforts doctrine as a theory of recovery. Instead, Justice Brennan, writing for a unanimous Court, concluded that, given the legislative history of § 301, "Congress limited the responsibility of unions for strikes in breach of contract to cases where the union may be found responsible according to the common-law rule of agency." 444 U.S. at ____, 100 S.Ct. at 413, 62 L.Ed.2d at ____.

Admittedly, in Carbon Fuel, the Supreme Court was addressing only the appeals involving the international and district unions. However, the applicability of the rule announced by the Court is not dependent upon the level of "union hierarchy" involved. The Court spoke of the "responsibility of *unions*," Carbon Fuel, supra (emphasis added), and this Court gives that language its plain meaning and holds that the "mass action" theory is no longer viable. This Court reaches the conclusion that the local union's liability, if any, must be determined according to the common-law rule of agency; accordingly, as other courts have concluded, the Court must look to whether the union instigated, supported, ratified or encouraged the work stoppage. See e.g. Airco Speer Carbon-Graphite v. Local 502, International Union of Electrical, Radio & Machine Workers of America, AFL-CIO, 494 F.Supp. 872, 108 LRRM 2779 (W.D. Pa. 1980); Lakeshore Motor Freight Co. v. International Brotherhood of Teamsters, Warehousemen & Helpers of America, Teamsters' Steelhaulers Local No. 800, 483 F.Supp. 1150, 104 LRRM 2153 (W.D. Pa. 1980).

Justice Powell has noted that "a suit for damages against the union entity rarely is feasible." Complete Auto Transit, Inc. v. Reis, 451 U.S. 401, ____, 101 S.Ct. 1836, 1848, ____, L.Ed.2d ____, 107 LRRM 2145 (1981) (concurring in part). While this

remedy may be largely "chimerical," nonetheless it is available to an employer, if the employer can prove the union's liability according to the common-law rule of agency.

Having determined the proper rule of law to apply in assessing the liability, if any, of the union and having now considered the evidence and the submissions of the parties, the Court enters the following findings of fact and conclusions of law pursuant to F.R.Civ.P. 52.

FINDINGS OF FACT*

1. The plaintiff, Consolidation Coal Company is a corporation organized and existing under the laws of the State of Delaware, with its principal office in the City of Pittsburgh, Allegheny County, Pennsylvania, and is engaged in the business of producing, processing and shipping bituminous coal from mines which it operates in various counties in West Virginia. Consol carries on its business, among other places, at its Blacksville No. 2 Mine in Monongalia County, West Virginia, where it employed approximately 400 employees on January 30, 1981. The coal mined at Blacksville No. 2 is sold and shipped through interstate commerce.

2. Defendant United Mine Workers of America, Local 1702 is an unincorporated labor organization holding a charter from the International Union, United Mine Workers of America. As such, it is both a self-governing body as well as an administrative division and agency of District 31, United Mine Workers of America, and the International Union, United Mine Workers of America. The defendant Local admits to membership and represents for collective bargaining purposes the UMWA production and maintenance employees at Consol's Blacksville No. 2 Mine.

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* Certain findings of fact were recorded by Judge Haden at the conclusion of the contempt hearing conducted on February 3, 1981. The issue before Judge Haden differed from the issue now before the Court and thus those findings are not incorporated herein.

3. At all times relevant to this litigation the defendant Freddie W. Kelley, Jr. was President of the defendant Local as well as a mine committeeman; the defendant Charles R. Fetty was Vice President of the defendant Local; the defendant Paul Smerdell was Financial Secretary of the defendant Local; and the defendants Jack P. Christoff and Richard A. Roberts were mine committeemen for the defendant Local. Such officers and mine committeemen are elected by the members of the Local. All were employees of Consol who worked at the Blacksville No. 2 Mine. All were authorized to act on behalf of Local 1702, to represent employee members in the processing of grievances, and to speak for that labor organization in the handling of local disputes, including efforts calculated to return to work striking members of Local 1702.

4. At all times relevant hereto Consol was a signatory to the National Bituminous Coal Wage Agreement of 1973. This contract had been executed by the United Mine Workers of America, and the defendant Local was a party to and bound by said collective bargaining agreement as a matter of law. At all times and places relevant to this litigation said collective bargaining agreement was in full force and effect.

5. Contained within the National Bituminous Coal Wage Agreement of 1978 (the "Contract") was language that (a) provided for the mandatory peaceful settlement of all local disputes (Article XXIII); (b) set forth a specific procedure whereby the employer could discharge employees (Article XXIV); and (c) specified that the integrity of the Contract would be maintained (Article XXVII).

6. At approximately 6:00 a.m. on the morning of Thursday, January 29, an employee of Consol at the Blacksville No. 2 Mine named John Anderson was allegedly observed in the process of removing company property from the mine. As a result, sometime between 6:00 a.m. and 8:00 a.m., Consol suspended employee Anderson with intent to discharge, pursuant to the terms of the Contract.

7. At the time Mr. Anderson was allegedly discovered removing property from Consol's premises, he had almost completed his eight-hour work shift. That shift began at 10:00 p.m. on Wednesday, January 28 and extended until approximately 6:00 a.m. on Thursday, January 29, 1981. During the course of his employment with Consol at the Blacksville No. 2 Mine prior to the date of discharge, Anderson performed most of his work duties with those employees who worked on the "midnight shift" extending from 12:01 a.m. until 8:01 a.m. each work day. For all practical purposes, therefore, Anderson was considered as a "midnight shift" employee.

8. Beginning at 12:01 a.m. on Friday, January 30, 1981, nearly all UMWA contract employees scheduled on the "midnight shift" refused to work that shift. The work stoppage continued from 12:01 a.m. on Friday, January 30 until 12:01 a.m. on Wednesday, February 4, 1981. Participating in the work stoppage were all of the members of the defendant Local, as well as all officers and mine committeemen of the defendant Local. At no time were there any pickets at the mine. Shortly after commencement of the strike the President of Local 1702 was instructed by Consol, via telegram, to immediately require the Local members to terminate the strike.

9. The incident giving rise to the work stoppage which commenced at 12:01 a.m. on Friday, January 30 was Consol's suspension with intent to discharge employee John Anderson.

10. Between 12:01 a.m. on Friday, January 30, when the work stoppage commenced, and 12:01 a.m. on Wednesday, February 4, when the work stoppage ended, Consol had scheduled nine production shifts of work, namely three on Friday, January 30, three on Monday, February 2 and three on Tuesday, February 3. Work, therefore, was available to the members, officers, and mine committeemen of the defendant Local throughout the period of the strike. Furthermore, the plaintiff had a market for coal that would have been produced during the period of the strike but for the miners' unwillingness to work.

11. After Consol suspended employee Anderson with intent to discharge, several meetings were held between Consol's representatives and officers and mine committeemen of the defendant Local. The "24-48" meeting was held on Friday morning, January 30. Both Consol and Local 1702 proceeded as rapidly as possible to have the Anderson matter submitted to arbitration under the terms of the Contract.

12. The work stoppage at Blacksville No. 2 which is the subject of this civil action, was solely over a dispute subject to resolution under Article XXIII and/or Article XXIV of the Contract. Thus, the work stoppage in question was solely over an arbitrable issue and was, therefore, a breach of the provisions of the Contract by the members, officers, and mine committeemen of the defendant Local, and the defendant Local itself. Ultimately the dispute over Anderson's discharge was resolved by arbitration and Anderson was returned to work with full reimbursement for pay lost.

13. The Contract between Consol and the United Mine Workers of America is binding upon not only the defendant Local but also the officers and mine committeemen of the defendant Local and all employees of Consol who are members of the defendant Local and represented for collective bargaining purposes by the defendant Local. The Contract further binds the defendant Local, and its officers and mine committeemen, to maintain and enforce the performance of said contract by its members and employees represented by it, and to maintain the integrity of the Contract.

14. The work stoppage was not authorized by the defendant Local in that a formal vote by the membership was not taken.

15. The defendant Local, acting by and through its officers and committeemen did take certain steps to end the work stoppage. The individual officers and committeemen went to work at the beginning of their regularly scheduled shifts of work during the work stoppage except for those shifts which they reported off for union business; the officers and commit-

teemen were dressed for work on some of these occasions and did encourage their fellow miners to report back to work.

16. A local union meeting, advertised by radio, was conducted on February 1, 1981. During this meeting, the meaning of the temporary restraining order then in effect was explained and the officers and committeemen, along with Mr. Rowan, a district union representative, instructed the miners to return to work.

17. At no time during the strike did the defendant herein arrange for television or radio broadcasts, or newspaper advertisements, urging the membership of Loal 1702 to return to work. At no time during the strike did the defendant prepare and mail any telegram or written communication to the membership of the defendant Local urging the membership to return to work. At no time during the strike did the defendant attempt to telephone the membership to instruct them to return to work.

18. The defendant Local did not use its "best efforts" to return the miners to work.

19. However, the weight of the evidence does not demonstrate that the defendant Local, acting by and through its officers and committeemen, instigated, supported, ratified or encouraged the work stoppage. Efforts were made to encourage the miners to return to work; those efforts were hampered somewhat by the involvement of the officers and committemen in the 24-48 hour meeting on January 30, 1981, the investigation and preparation of the Anderson grievance, the arbitration initially scheduled for February 3, 1981 and actually conducted on February 4, 1981, the contempt hearing conducted before Judge Haden on February 3, 1981 and the short duration of the actual stoppage.

20. All findings of fact herein are supported by clear, convincing and competent evidence. The very few credibility questions which arose have been resolved on the basis of witness demeanor or proof of prior inconsistent statements, or both.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the instant civil action pursuant to Section 301 of the Labor-Management Relations Act of 1947, as amended by the Labor-Management Reporting Disclosure Act of 1959 (29 U.S.C. § 185).

2. Section 301 of the Labor-Management Relations Act of 1947 authorizes an action for damages against a local union for an illegal work stoppage.

3. Before a local union can be found liable for such damages, the union's responsibility must be established according to the common-law rule of the agency. Carbon Fuel Company v. United Mine Workers of America, 444 U.S. 212, 100 S.Ct. 410, 62 L.Ed.2d 394, 102 LRRM 3017 (1974).

4. The "mass action" theory of liability is no longer viable. Carbon Fuel, supra.

5. Although the defendant Local failed to use "best efforts" to return its members to work, there is insufficient evidence to establish the necessary agency relationship upon which an award of damages could be based. The defendant Local did not authorize, instigate, support, ratify or encourage the illegal work stoppage.

6. The integrity clause of the Contract cannot be construed as imposing upon the defendant Local an obligation to take disciplinary action to force unauthorized strikers to return to work. Carbon Fuel, supra.

Accordingly, the Court hereby ORDERS that plaintiff's claims against the officers and committemen of the defendant local union be dismissed. As to the remaining claims, the Court ORDERS that judgment be entered for the defendant Local 1702. There being nothing further in this matter, the Clerk is directed to strike this case from the Court's docket.

The Clerk is hereby directed to transmit certified copies of this Memorandum Opinion and Order to counsel of record herein.

Judgment Order

This action came on for trial before the Court, Honorable William M. Kidd, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is ORDERED and ADJUDGED that

(1) the Court's findings of fact and conclusions of law are incorporated herein by reference;

(2) plaintiff's claims against the defendant officers and committemen are hereby dismissed with prejudice;

(3) as to the defendant Local 1702, United Mine Workers of America, the plaintiff take nothing, that the action be dismissed on the merits and that the defendant Local 1702 recover of the plaintiff its costs of this action.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-1567

CONSOLIDATION COAL COMPANY, a corporation,

versus

LOCAL 1702 UNITED MINE WORKERS OF AMERICA: FREDDIE W. KELLEY, JR.; CHARLES R. FETTY; PAUL SMERDELL; JACK P. CHRISTOFF and RICHARD A. ROBERTS,

---

ORDER

Upon consideration of the appellees' petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Chapman for a panel constiting of Judge Russell, Judge Chapman, and Judge Haynsworth.

FILED
JUL 29 1983
U.S. Court of Appeals
Fourth Circuit

For the Court,

/s/ William K. Slate, II
WILLIAM K. SLATE, II
Clerk

APPENDIX D

Labor Management Relations Act
(29 U.S.C. § 185(a))

§ 185. SUITS BY AND AGAINST LABOR ORGANIZATIONS.

(a) Venue, amount, and citizenship.

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

Jurisdiction

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

Service of process

(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

Determination of question of agency

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

Supreme Court, U.S.
FILED
OCT 28 1983
ALEXANDER L. STEVAS
CLERK

No. 83-510

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

LOCAL UNION 1702, UNITED MINE WORKERS OF AMERICA,
Petitioner,

v.

CONSOLIDATION COAL COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

Respondent, Consolidation Coal Company, does not agree with the petitioner's statement of the questions presented. Properly, the questions presented are as follows:

1. Whether a local union may be held liable in damages for breaching a collective bargaining agreement, under the so-called "mass action" theory of liability, when all of the local's members, officers and committeemen participated in a wildcat strike?

2. Whether a local union may be held liable in damages for breaching a collective bargaining agreement, under the so-called "common-law agency" theory of liability, when the efforts of the local union to bring a wildcat strike to an end were so minimal as to be foreseeably ineffective?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-510

LOCAL UNION 1702, UNITED MINE WORKERS OF AMERICA,
Petitioner,

v.

CONSOLIDATION COAL COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION

The respondent, Consolidation Coal Company,[1] submits that the petition of Local Union 1702, United Mine Workers of America,[2] for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case should be denied. Consol concurs with Local 1702's discussion of the *Opinions Below*, *Jurisdiction*, and *Statute Involved*.

---

[1] Respondent, Consolidation Coal Company, will henceforth be referred to as "Consol."

[2] Petitioner, Local Union 1702, United Mine Workers of America, will henceforth be referred to as "Local 1702."

I.

COUNTERSTATEMENT OF THE CASE

A. General Background.

Consol is engaged in the business of producing, processing and shipping bituminous coal from mines which it operates in various states, including the Blacksville No. 2 Mine in Monongalia County, West Virginia [App. 8-9, 27, 38].[3] At all times relevant hereto, Consol employed approximately 400 production and maintenance employees at Blacksville No. 2 Mine, all of whom were members of, and represented for collective bargaining purposes by, Local 1702 [App. 38-39, 75-76, 81-82, 96-98, 152-53].

Consol and Local 1702 were parties to the National Bituminous Coal Wage Agreement of 1978 [App. 39, 150-51, 234]. Article XXIII of the contract provided for the mandatory peaceful settlement of all disputes, including disputes over discharging employees [App. 39, 238-42]; Article XXIV set forth a specific procedure whereby Consol could discharge employees [App. 39, 242-44]; and Article XXVII specified that the integrity of the contract would be maintained [App. 39, 41, 244-45].[4]

B. Unauthorized Work Stoppage.

At approximately 6:00 a.m. on Thursday, January 29, 1981, a Consol foreman observed an employee on the

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[3] Citations to the Appendix herein refer to the Joint Appendix prepared for purposes of the appeal in the United States Court of Appeals for the Fourth Circuit. Pursuant to Rule 19.1 of the Rules of the United States Supreme Court, Consol requested the Clerk of the Fourth Circuit to certify and transmit the Joint Appendix to this Court.

[4] The language in Article XXVII has been given the same effect as an explicit "no-strike" clause. *See Gateway Coal Co. v. UMWA*, 414 U.S. 368 (1974).

Blacksville No. 2 Mine midnight shift named John Anderson in the process of stealing company property from the mine. Consol promptly suspended employee Anderson, simultaneously expressing its intent to discharge him in accordance with the contract procedures set forth in Article XXIV [App. 39-40, 84-85, 102, 129, 153-54, 173, 185, 238-42].

Despite the availability of grievance and arbitration procedures, and notwithstanding the employees' contractual agreement not to strike over issues cognizable under the grievance procedure, commencing at 12:01 a.m. on Friday, January 30th, the midnight shift at Blacksville No. 2 Mine embarked upon a "wildcat" strike over Anderson's discharge [App. 40, 58-59, 70, 86-87, 119, 130, 132-33, 141, 143, 155, 173-74]. Shortly after commencement of the strike, Consol sent a telegram to Local 1702 President Freddie W. Kelley demanding that he immediately require Local 1702 members to terminate their illegal strike activity [App. 40, 317]. Nevertheless, the work stoppage continued without interruption on all work shifts until 12:01 a.m., Wednesday, February 4th [App. 40-41, 59-60, 63, 64-65, 88]. Participating in the work stoppage were all officers, mine committeemen and members of Local 1702 [App. 58-59, 61-63].

It is undisputed that the wildcat strike was to protest the discharge of employee Anderson. It is also undisputed that the underlying issue giving rise to the strike was a dispute clearly subject to the contractual grievance and arbitration procedures [App. 41, 86-87].

Between 12:01 a.m. on Friday, January 30th and 12:01 a.m. on Wednesday, February 4th, Consol had scheduled nine production shifts of work [App. 59-63, 82, 87-88]. Additionally, Consol had scheduled certain members of Local 1702 to perform maintenance work on Saturday, January 31st [App. 40-41, 89]. Therefore, work was available to the officers, mine committeemen and members of Local 1702 throughout the period of the strike [App.

63, 88-89]. Moreover, Consol had a constant market for the coal which would have been produced during the period of the strike [App. 41, 83, 94].

C. Issuance And Violation Of Temporary Restraining Order; Assessment Of Fine.

On January 30th, 1981, Consol filed a complaint in the United States District Court for the Northern District of West Virginia against Local 1702, as well as its officers and mine committeemen, seeking a *Boys' Markets* temporary restraining order to enjoin the illegal strike and directing all officers and members of Local 1702 to return to work. That same afternoon, the District Court issued a temporary restraining order applicable to Local 1702 and its officers, committeemen and members, ordering them to cease their illegal work stoppage and to return to work [App. 89, 104].

Notice was promptly given of the requirements of the temporary restraining order. All officers and committeemen of Local 1702 were served with the order on Saturday, January 31st [App. 89-90, 121, 132, 144, 155-56]; certified copies of the order were posted on January 31st at conspicuous locations at Blacksville No. 2 Mine [App. 89-90]; and the requirements of the temporary restraining order were widely publicized by Consol in the north central West Virginia geographic area by radio and television on January 30th, January 31st, and February 1st [App. 94].

When the Local and its officers, committeemen and members all failed to obey the temporary restraining order, the District Court held them in civil contempt and assessed certain fines [App. 104]. Although some of the fines were remitted, others were reduced to judgment, and the United States Court of Appeals for the Fourth Circuit eventually upheld the civil contempt determination and fine assessments of the District Court. *See Consolidation Coal Co. v. Local 1702, UMWA*, 683 F.2d 827 (4th Cir. 1982).

D. Denial Of Compensatory Damages For Breach Of Contract In District Court Action.

In addition to a temporary restraining order, in its complaint filed on January 30th, pursuant to § 301 of the Labor-Management Relations Act,[5] Consol sought compensatory damages for its losses sustained as a result of the unlawful strike.[6] On October 30th, a non-jury trial was held before the Honorable William M. Kidd, Judge of the United States District Court for the Northern District of West Virginia.

In addition to the facts previously mentioned herein, the trial record undisputably shows that Local 1702, by virtue of its own Bylaws and the UMWA International Constitution, was obligated to use its authority and available means and methods to require its members to refrain from and to terminate unauthorized work stoppages. Specifically, officials of Local 1702 had the following self-imposed obligations: (1) not to encourage or *participate* in "wildcat" strikes [App. 260-61, 289]; (2) to "exert *every* reasonable effort available to discourage and prevent unauthorized stoppages or walkouts"; (3) to "take *all* measures necessary to terminate *immediately* all such stoppages and walkouts" [App. 278, 281, 314 (emphasis added)]; and, (4) to schedule a meeting "as soon as possible" after the work stoppage occurred [App. 254, 284, 315]. Additionally, the officials of Local 1702 had it within their means and power to charge formally those members and officers who violated their respective obligations under the collective bargaining agreement; to subject the violators to a trial before their UMWA peers; and, if found guilty, to reprimand or fine each of them up to $200.00 [App. 261-64, 284-87, 311-12]. Finally, the officials of Local 1702 could have sought help from

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[5] 29 U.S.C. § 185.

[6] Although Consol filed this § 301 action against not only Local 1702, but also its officers and committeemen, Consol pursued the damage claim against the Local alone.

the International UMWA President or the International UMWA Executive Board.

The record is clear that Local 1702, and its officers and committeemen, failed to resort to the foregoing means and methods in order to exert authority and control over the membership of Local 1702 and end the strike. On the contrary, the record demonstrates that at no time during the strike did the officers and committeemen go to work, or sincerely attempt to go to work, in order to serve as examples for the other employee members of Local 1702 [App 91-92, 94, 117, 120-21, 131-32, 134-35, 145, 156-57, 188-90]; at no time did any representative of Local 1702 arrange for "back to work" television or radio broadcasts, or newspaper advertisements instructing the members of Local 1702 to comply with the terms of the contract;[7] and at no time did Local 1702 send any telegram or written communication to, or telephone, the members of Local 1702 urging them to return to work [App. 42, 125-26, 144-45, 162-65]. Although Local 1702 called a "special meeting" for Sunday, February 1st, that meeting was not called "as soon as possible" after commencement of the strike at 12:01 a.m. on Friday, January 30th. Furthermore, at no time during the union meeting did Local officers or committeemen make or encourage a return-to-work motion or suggest a vote on the question of whether to return to work [App. 143, 166-68].

The record shows that after the strike began, Local 1702 officials were, to a certain extent, involved in the processing of the Anderson grievance. During the same

[7] Although Local 1702 initially did not arrange for "back to work" announcements, Local 1702 President Freddie Kelley did arrange for radio broadcasts to announce the special meeting called for Sunday, February 1st [App. 42, 161-62, 188-89]. Then, after being held in contempt on February 3rd, and meeting with United States District Court Judge Charles H. Haden, II on the same date, Kelley finally arranged for broadcasts telling the men to go back to work [App. 162-63].

period of time, their only "efforts" to end the strike consisted of two types of activities. First, the one or two Local officials who were scheduled to work a particular shift showed up at the bathhouse or the parking lot prior to the commencement of that shift and supposedly gave verbal directives to the members present to return to work [App. 48, 90-91, 107-09, 111, 114-15, 116-17, 119-20, 134-36, 192-93, 204-05, 208-09, 214-15, 218-19]. Second, at the meeting on Sunday, February 1st, the officials supposedly gave more verbal directives to the members to return to work [App. 42, 159, 167-68, 178-80, 189].

Finally, a review of the record reveals that at the conclusion of the civil contempt hearing late in the afternoon on Tuesday, February 3rd, Judge Haden met with Local 1702 President Kelley and Mine Committeeman Richard Roberts and urged them to put on their work clothes and lead the men back into the mines [App. 186]. Significantly, when Kelley and Roberts complied with Judge Haden's instructions, and when the union finally broadcast the "back to work orders," the work stoppage promptly ended, with production resuming at 12:01 a.m. on Wednesday, February 4th [App. 64-65].

At trial, Consol relied upon two well-recognized legal theories of local union contractual liability, namely, the "mass action" theory and the common-law agency theory. The District Court, however, refused to give any consideration to the mass action theory, interpreting the opinion of this Court in *Carbon Fuel Co. v. UMWA*, 444 U.S. 212 (1979), as a *complete* repudiation of that theory [App. 37]. In refusing to apply the mass action theory to the essentially undisputed facts of this case, the District Court seized upon the following language of this Court's *Carbon Fuel* decision: "Congress limited the responsibility of unions for strikes in breach of contract to cases when the union may be found responsible according to the common-law rule of agency." 444 U.S. at 216.

Moreover, the District Court held that Local 1702 was not liable for breach of contract under the common-law agency theory. After reciting the means and methods Local 1702 had at its disposal, but did not utilize, to attempt to persuade its membership to return to work, the District Court opined that the Local's efforts were

> hampered somewhat by the involvement of the officers and committeemen in the 24-48 hour meeting on January 30, 1981, the investigation and the preparation of the Anderson grievance, the arbitration initially scheduled for February 3, 1981 and actually conducted on February 4, 1981, the contempt hearing conducted before Judge Haden on February 3, 1981, and the short duration of the actual stoppage.

[App. 42].

E. Reversal By The Fourth Circuit; Holding Of Local Union Liability Based Upon Application Of Both The Mass Action Theory And The Common-Law Agency Theory.

On appeal, the United States Court of Appeals for the Fourth Circuit found that the District Court had misconstrued this Court's *Carbon Fuel* decision and held that the mass action principle was fully applicable to the case at bar. *See Consolidation Coal Co. v. Local 1702, UMWA*, 709 F.2d 882, 885 (4th Cir. 1983). The Fourth Circuit pointed out that only district and international, and not local, union liability was at issue before this Court in *Carbon Fuel*. Therefore, *Carbon Fuel* did not preclude local union liability. 709 F.2d at 885.

Furthermore, after reviewing the undisputed operative facts, the Fourth Circuit ruled "clearly erroneous" the District Court's determination that Local 1702 was not liable for breaching the collective bargaining agreement under the so-called "common-law agency" theory. 709 F.2d at 886. Contrasting the "meager efforts" of Local 1702 to end the strike with the Local's unused, but avail-

able, means to persuade its members to return to work, the Fourth Circuit found that the union's "efforts" to end the strike were "foreseeably ineffective." And, based upon "the lack of efforts by Local 1702 to return its members to work," the Court concluded that "the local union ratified and encouraged the strike and is, accordingly, liable under common-law agency theory for damages caused . . . by the illegal work stoppage." *Id.* at 886.

II.

REASONS FOR DENYING THE WRIT

A. Although The Fourth Circuit Is In Conflict With The Sixth Circuit With Respect To The Applicability Of The Mass Action Theory, The Fourth Circuit Is In Complete Accord With This Court's *Carbon Fuel* Decision As Well As The Decisions Of The Other Circuits Which Have Decided The Mass Action Issue.

1. *Historically, The Mass Action Theory Has Been Applied Correctly Only To The Entity Whose Members Act En Masse.*

The concept of union responsibility for the mass action of its members was first espoused in *United States v. International Union, UMWA*, 77 F. Supp. 563 (D.D.C. 1948), *cert. denied*, 338 U.S. 871 (1949). In that case, the members of the UMWA staged a nationwide "walkout" of coal mines. Subsequently, the district court issued a temporary restraining order directing that the status quo be resumed and that the miners return to work. When the miners refused, thereby violating the terms of the temporary restraining order, the court held the national union in contempt. In response to arguments propounded by the union that rank-and-file miners left the mine of their own volition and without instructions from the union, the court stated:

> If a nod or a wink code was used in place of the word "strike," there was just as much a strike called as if the word "strike" had been used.
>
> . . . .
>
> The Court thinks that the principle is this: *that as long as a union is functioning as a union it must be held responsible for the mass action of its members.* It is perfectly obvious not only in objective reasoning but because of experience that men don't act collectively without leadership. The idea of suggesting that from 350,000 to 450,000 men would all get the same idea at once, independently of leadership, and walk out of the mines, is of course simply ridiculous.

Id. at 566 (emphasis added).

Often cited as a leading case supporting the mass action theory of union liability is *Eazor Express, Inc. v. International Brotherhood of Teamsters*, 520 F.2d 951 (3d Cir. 1975), *cert. denied*, 424 U.S. 935, *reh'g denied*, 425 U.S. 908 (1976). In *Eazor*, after the members of the two local unions engaged in a wildcat strike, a § 301 breach of contract damage action was filed against both locals and the international. Drawing upon reasoning similar to that utilized by the court in *United States v. International Union, UMWA*, 77 F. Supp. 563, the *Eazor* court applied mass action as one theory of liability and held the Teamster locals as well as the international liable in damages for the employer's losses resulting from the strike.

One year later, in *United States Steel Corp. v. UMWA*, 534 F.2d 1063 (3d Cir. 1976), the Third Circuit circumscribed the rule of *Eazor Express* by holding—quite logically—that union liability under the mass action theory must be "limited to the entity whose membership acts in concert." Therefore, without a showing of "complicity" on the part of the district or international, the local is

the *only* union entity that could be held liable under the mass action theory. 534 F.2d at 1074.

Prior to this Court's *Carbon Fuel* decision, the Fourth Circuit also limited liability for "wildcat" strikes to the local union. In *United Construction Workers v. Haislip Baking Co.*, 223 F.2d 872 (4th Cir.), *cert. denied*, 350 U.S. 847 (1955), the court was confronted with a § 301 action against two national unions for an illegal work stoppage by the employees of a bakery. In distinguishing between the liability of the local and international unions, the Fourth Circuit stated:

> The local union was liable because the strike, although informally commenced, unquestionably had the approval of the local union; but this was not true of the [national unions].
>
> . . . We have never held, however, that there is any responsibility on the part of a union for a strike with which it has had nothing to do; and there manifestly is no such liability.

Id. at 877.

Similarly, better-reasoned cases on mass action decided before *Carbon Fuel* follow the wisdom of the Third Circuit in *United States Steel Corp.*, 534 F.2d 1063, and the Fourth Circuit in *Haislip*, 223 F.2d 872, by limiting union liability for the mass action of its members, absent "complicity" on the part of the larger union entity, to the local. *See, e.g., United States Steel Corp. v. UMWA, District 20*, 598 F.2d 363 (5th Cir.), *reh'g denied*, 605 F.2d 555 (5th Cir. 1979); *Black Diamond Coal Mining Co. v. Local Union No. 8460, UMWA*, 597 F.2d 494 (5th Cir. 1979); *Turnkey Constructors, Inc. v. Cement Masons Local Union No. 685*, 580 F.2d 798 (5th Cir. 1978); *Molded Materials Co. v. International Union of Electrical, Radio & Machine Workers*, 418 F. Supp. 548 (W.D. Pa. 1976). *Cf. California Trucking Association v. Brotherhood of Teamsters, Local No. 70*, 679 F.2d 1275 (9th

Cir. 1981), *cert. denied*, —— U.S. ——, 74 L. Ed. 2d 281, 103 S. Ct. 299 (1982); and *Danielson v. United Seafood Workers Smoked Fish & Cannery Union, Local 359*, 405 F. Supp. 396 (S.D.N.Y. 1975).[8]

2. *The Decision Below Is Not In Conflict With This Court's* Carbon Fuel *Decision Because This Court, In* Carbon Fuel, *Did Not Vitiate Or Even Address The Mass Action Theory Of Liability With Respect To Local Unions.*

In *Carbon Fuel Co. v. UMWA*, 444 U.S. 212 (1979), this Court made it clear that, in the absence of a contractual "best efforts" clause, neither an *international* nor a *district* UMWA union (vis-a-vis the local union) can be held liable for damages in a § 301 suit unless the employer can prove instigation, support, ratification or encouragement of a strike. If, as Local 1702 argues, this Court intended its *Carbon Fuel* decision to end altogether the use of the mass action theory—a well-recognized and widely-applied basis for local union liability for over 30 years—why did the Court not manifest such intent in unequivocal and unmistakable language. On the contrary, this Court did not even discuss the concept of mass action as it applies to local unions, although certain language in the opinion suggests clearly that the mass action theory of local union liability remains viable.

Carbon Fuel involved a § 301 suit initiated in district court against the international, the district and three local UMWA unions. Damages were sought as a result of numerous work stoppages which had occurred at various employer mines during a five-year span. The trial court found as a matter of law that the strikes violated

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[8] As discussed, *infra*, in the historical development of the mass action theory, only the Sixth Circuit declined to adopt mass action as a theory of local union liability. *See Peabody Coal Co. v. Local Unions 1734, 1508, 1548 & District No. 23, UMWA*, 543 F.2d 10 (6th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977).

the labor agreement, and a jury returned verdicts in different amounts against the locals as well as the international and district unions.

On appeal, consistent with its earlier decision in *United Construction Workers v. Haislip Baking Co.*, 223 F.2d 872, and the Third Circuit's ruling in *United States Steel Corp. v. UMWA*, 534 F.2d 1063, the Fourth Circuit vacated the judgments against the international and district unions. The Fourth Circuit, however, affirmed the judgments against the local unions, stating that "responsibility for wildcat strikes under this theory [mass action] ordinarily will be limited to the local union." *Carbon Fuel Co. v. UMWA*, 582 F.2d 1346, 1349 (4th Cir. 1978).

This Court subsequently granted Carbon Fuel Company's petition for a writ of certiorari to review the Fourth Circuit's refusal to enforce the judgments obtained against the international and district unions. Significantly, however, the local unions, against which judgments were upheld on the mass action theory of contractual liability, did not seek review of the Fourth Circuit's holding that the mass action theory may properly be applied to them. Thus, as Local 1702 correctly recognized in its petition (p. 6, n.3), this Court in *Carbon Fuel* was not presented with, and did not address, the question of whether mass action is a proper theory of liability when applied to local unions.

In the case *sub judice*, both the District Court and Local 1702 seized upon the following *Carbon Fuel* language to support their view that this Court implicitly rejected the application of the mass action theory to local unions:

> Insofar as petitioner's argument relies on the history of § 301 and the congressional plan to prevent and remedy strikes in breach of contract by encouraging arbitration, the legislative history is clear that Congress limited the *responsibility of unions* for

> strikes in breach of contract to cases when the union may be found responsible according to the common-law rule of agency.

444 U.S. at 216 (emphasis added). Thus, both the District Court and Local 1702 interpret the "responsibility of unions" language to be broad enough to encompass local unions.

By reading this Court's opinion in *Carbon Fuel* in conjunction with the previous case law, however, it becomes clear that the District Court's interpretation of the *Carbon Fuel* opinion was incorrect. Mass action was *not* the issue in *Carbon Fuel.* Instead, this Court decided a "reasonable efforts to end' issue which related only to international and district union liability, stating, "[r]eview of the judgments against the locals [which were based upon mass action] was not sought here." 444 U.S. at 215, n.3.

Second, and more importantly, language in the *Carbon Fuel* opinion suggests approval of the traditional view that local unions may be contractually liable under the mass action theory. On page 215 of its opinion, this Court quoted with approval the following language from the Fourth Circuit's *Haislip* decision:

> We have never held . . . that there is any responsibility on the part of a union for a strike with which it had nothing to do . . . .

United Construction Workers v. Haislip Baking Co., 223 F.2d at 877. Implicit, of course, is the notion that when a union has something to do with a strike, there may be responsibility.

Similarly, in the *Carbon Fuel* footnote explaining the language relied upon by the District Court herein to reject mass action as a viable legal theory, this Court stated:

> [W]e are addressing the . . . issue of whether an *international or district* union may be held legally

> responsible for *locals' unilateral* actions which are *concededly in violation of the locals' responsibilities* under the contract.

444 U.S. at 216, n.5 (emphasis added). It is important to recognize that the contractual violation and liability of the locals in *Carbon Fuel*, treated as a matter of concession by this Court, were predicated upon application of the mass action theory. This Court did not abrogate the longstanding policy of holding local unions liable for breach of a collective bargaining agreement under the mass action theory. On the contrary, *Carbon Fuel*, properly read, contains support for continued application of the mass action doctrine.

3. *Only The Sixth Circuit Is In Conflict With The Fourth Circuit With Respect To The Applicability Of The Mass Action Theory To Local Unions.*

As previously mentioned, during the historical development of the "mass action" concept, only the Sixth Circuit has declined to apply that theory of liability to local unions. *Peabody Coal Co. v. Local Unions 1734, 1508, 1548 & District No. 23, UMWA*, 543 F.2d 10; *Davis Co. v. United Furniture Workers of America*, 674 F.2d 557 (6th Cir.), *cert. denied*, —— U.S. ——, 74 L. Ed. 2d 279, 103 S. Ct. 296 (1982). Consequently, only the Sixth Circuit is in conflict with the decision below. Reliance by Local 1702 on the cases it cites in support of its argument that the Fourth Circuit is in conflict with the Eleventh, Third and Fifth Circuits is misplaced.

First, in *North River Energy Corp. v. UMWA*, 664 F.2d 1184 (11th Cir. 1981), the employer was a signatory to the National Bituminous Coal Wage Agreement of 1978 and operated an underground mine at which Local 1926 of the UMWA represented approximately 450 miners. After a series of illegal work stoppages over grievable issues, the employer brought a

§ 301 action against the local union. Although failing to apply mass action under the facts of that case, the Eleventh Circuit clearly recognized it as a viable theory of law, correctly stating that liability under the mass action theory "is limited to the entity whose membership acts in concert, usually the local union." *Id.* at 1193-94. *See also Alabama By-Products Corp. v. Local No. 1881, UMWA*, 690 F.2d 831 (11th Cir. 1982), wherein the Eleventh Circuit applied the mass action theory.

Next, Local 1702 speculates that because the Third Circuit affirmed, without opinion, the District Court's decision in *Airco Speer Carbon-Graphite v. Local 502, International Union of Electrical, Radio & Machine Workers of America*, 494 F. Supp. 872 (W.D. Pa. 1980), *aff'd*, 649 F.2d 858 (3d Cir. 1981), it adopted the statement of the district court therein that "the mass action theory [did] not survive *Carbon Fuel.*" 494 F. Supp. at 876. Despite that statement, however, the district court had held the local union liable under the "common-law agency" theory for ratifying the illegal strike. As previously discussed herein, the Third Circuit had historically and repeatedly applied the mass action theory to local unions. In view of that precedent, it only stands to reason that the Third Circuit would not abrogate the oft-applied and longstanding mass action theory of local union liability without even providing an opinion. Indeed, it is more likely that the Third Circuit was merely affirming the District Court's finding of local union liability under the "common-law agency" theory.

Finally, Local 1702 has taken out of context the language it quotes from the Fifth Circuit's decision in *United States Steel Corp. v. UMWA*, 519 F.2d 1249 (5th Cir. 1975), *reh'g denied*, 526 F.2d 377 (5th Cir. 1976). Indeed, in that case the Fifth Circuit quoted with approval its statement and application of the mass action principle in *Vulcan Materials Co. v. United Steel-*

workers of America, 430 F.2d 446, 456 (5th Cir. 1970), *cert. denied*, 401 U.S. 963 (1971). Moreover, Local 1702 also seems to have ignored *United States Steel Corp. v. UMWA*, 598 F.2d 363 and *Turnkey Constructors, Inc. v. Cement Masons Local Union No. 685*, 580 F.2d 798, wherein the Fifth Circuit found mass action to be a viable theory of local union liability.[9]

B. Mass Action Aside, Because The Decision Below Is Not In Conflict With Holdings Of This Court, Or Other Circuit Courts, With Respect To Application Of The Common-Law Agency Theory Of Local Union Liability, This Court Should Affirm The Decision Below Based Upon Operative Facts Which Compel A Finding Of Local Union Ratification Of The Strike.

As previously discussed, an alternate theory of local union liability for unauthorized work stoppages is the so-called "common-law agency" theory whereunder "liability is dependent upon a showing that the union in some way made itself a party to the illegal strike" by way of encouragement, support or ratification thereof. *North River Energy Corp. v. UMWA*, 664 F.2d at 1192. Moreover, in order for local officials to encourage, support or ratify an illegal strike on behalf of the local union, they need not perform any affirmative action of ratification or support. "Ratification occurs where the union's efforts to return strikers are so minimal that the union's approval or encouragement may be inferred." *United States Steel Corp. v. UMWA, District 20*, 598 F.2d at 365.

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[9] For other cases decided in the wake of *Carbon Fuel* which approve the continuing viability of the mass action theory as it applies to local unions, *see, e.g., Dresser Industries, Inc. v. United Steelworkers of America, Local 4601*, 110 L.R.R.M. 2661 (W.D.N.Y. 1981); *Keebler Co. v. Local 492-A, Bakery, Confectionary & Tobacco Workers International Union*, 104 L.R.R.M. 2625 (E.D. Pa. 1980); *Consolidation Coal Co. v. International Union, UMWA*, 500 F. Supp. 72 (D. Utah 1980).

In the case at bar, the Fourth Circuit relied upon undisputed facts adduced at trial in holding that the district "court's finding of a lack of ratification and encouragement by the local union is clearly erroneous." *Consolidation Coal Co. v. Local 1702, UMWA*, 709 F.2d at 886. The Fourth Circuit recognized that although the UMWA Constitution and the Local 1702 Bylaws imposed certain duties upon the Local officials to end the strike,[10] no official of Local 1702 made any effort to use radio, television or other news medium to publicly urge the Local membership to end the strike. Likewise, no official of Local 1702 ever threatened the use of internal union discipline against members who failed to return to work, despite the fact that the UMWA Constitution and Local Bylaws bestowed that power upon the Local officials; no official of Local 1702 ever dressed for work and went into the mine in an attempt to lead the rank-and-file miners back to work; no Local official ever wrote to the members or mailed any communication indicating that the strike should end; no Local official ever made any effort to telephone the members individually to urge them to return to work. *Id.* at 886.

The Fourth Circuit contrasted that "long list" of activities which the Local could have taken with the two "meager" efforts which Local officials supposedly made to "attempt" to end the strike. The sum and substance of these "efforts" consisted of oral "instructions" or "encouragement" to the miners to return to work. The "in-

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[10] The Fourth Circuit acknowledged that the UMWA Constitution and the Bylaws of Local 1702 imposed duties on Local officials which, *inter alia*, were to enforce the contract, to take all measures necessary to end all unauthorized work stoppages, not to support or participate in any strike unsanctioned by the International, and to subject those members who violate their contractual obligations to trial and punishment. *Id.* at 886.

structions" or "encouragement" took place in the privacy of the miners' bathhouse prior to the beginning of each shift and behind the closed doors of the meeting hall where the special union meeting called for February 1st was held. No disinterested person knows exactly what was said to the Local members in these directives, the tone of the communication, or, indeed, whether they were made with an accompanying and guiding "nod" or "wink." Based upon those facts, the Fourth Circuit held that the "efforts made by union officials to end the strike were 'foreseeably ineffective,' " and that their lack of effort amounted to ratification of the illegal activity. *Id.* at 886 (citation omitted).

In its petition, Local 1702 improperly attempts to equate the Fourth Circuit's finding of ratification to the now defunct theory that a local union could be held liable for breach of contract under common-law agency principles for failing to use its "best efforts" or "all reasonable means" to end a strike.[11] In this fashion, Local 1702 attempts to place the decision below in conflict with this Court's *Carbon Fuel* decision, the decisions of the Sixth Circuit in *Southern Ohio Coal Co. v. UMWA*, 551 F.2d 695, *cert. denied*, 434 U.S. 876 (1977) and *United Steelworkers of America v. Lorain, a Division of Koehring*

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[11] In *Eazor Express, Inc. v. International Brotherhood of Teamsters*, 520 F.2d 951, the Third Circuit held that implied in the no-strike provision of the applicable collective bargaining agreement was the obligation on the part of the International and Local unions to use their "best efforts" or "all reasonable means" at their disposal to end the wildcat activity of their members. In the event that the unions failed to use their "best efforts," the unions could be held liable for breach of contract under the principles of agency. The "best efforts" approach has been repudiated when "best efforts" was not contemplated by the parties while bargaining. *See Carbon Fuel Co. v. UMWA*, 582 F.2d 1346; *Airco Speer Carbon-Graphite v. Local 502, International Union of Electrical, Radio & Machine Workers of America*, 494 F. Supp. 872.

Co., 616 F.2d 919 (1980), *cert. denied*, 451 U.S. 983 (1981), and the Ninth Circuit decision in *California Trucking Association v. Brotherhood of Teamsters*, 679 F.2d 1275.

Local 1702's attempted equation of "ratification" with "failure to use best efforts" fails because the premise of the argument is incorrect. The Local seems to be suggesting that it be absolved from liability for taking any action whatsoever to end the strike, even if the action was "foreseeably ineffective," thereby erasing the concept of ratification from common-law agency principles. A close reading of the opinion below reveals that the Fourth Circuit has not required that local union officials use their "best efforts" or "all reasonable means" to end the strike. Instead, the Fourth Circuit merely held that, in this particular factual context, the Local, by its foreseeably ineffective action, ratified and hence joined in the strike.

Local 1702 cites no case to support its position that the Fourth Circuit's finding of ratification is tantamount to requiring "best efforts" on the part of the Local officials. Perhaps this is so because case law from other circuits supports the Fourth Circuit's finding of ratification.

For example, the facts of the case at bar are practically "on all fours" with the facts of *United States Steel Corp. v. UMWA, District 20*, 598 F.2d 363, wherein the Fifth Circuit held that the local union was liable for breach of contract because its officers had ratified a wildcat strike. In *United States Steel*, the local president and several mine committeemen had gone into the bathhouse and told the first shift to go to work. Those orders were ineffective, and when the evening shift also failed to work, the local president called and publicized by radio a meeting of the local membership for the next morning. Following this meeting, the membership

remained on strike, and as a consequence, a second meeting was called for the second day. At the second meeting, "efforts" were again made to persuade the membership to cease the work stoppage with the same unsuccessful results as at the first meeting.

The Fifth Circuit in *United States Steel* held that the steps taken by the local officers were "foreseeably ineffective." [12] As in the instant case, the local membership meeting was not called at the earliest possible time. Further, the local officials made no attempt to reach the strikers by telephone, did not themselves work, and neither took nor threatened union disciplinary action against strike participants. Based upon those facts, the local officials' back-to-work directives were characterized as being "so lacking in authoritative forcefulness that they either were not heard at all . . . or were discounted as being merely stage lines parroted for the benefit of some later judicial review." 598 F.2d at 366. Furthermore, what force the directives may have had was belied by the union officials' failure to return to work. In conclusion, the Fifth Circuit stated that where a union's efforts to return to work are so minimal that the union's approval or encouragement may be inferred, the union itself ratifies the strike, and, as a matter of law, adopts the illegal activity as its own.

In addition, there is a decision out of the Third Circuit which is fully in accord with the decisions of the Fourth and Fifth Circuits. In *Airco Speer Carbon-Graphite v. Local 502, International Union of Electrical, Radio & Machine Workers of America*, 494 F. Supp. 872, the Third Circuit affirmed without opinion the district court's decision stressing the inaction of the local officials

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[12] Although *not* holding the local liable for damages "on the theory that any particular more effective tactic was left untried," the availability of stronger persuasive measures was considered "relevant to the critical question of the reasonableness of the steps which were taken." *United States Steel Corp.*, 598 F.2d at 366.

with respect to taking steps to persuade the members to return to work and holding the local liable for wildcat activity of its members upon a ratification theory.[13]

Moreover, Local 1702 misplaces reliance on the Sixth Circuit's decision in *United Steelworkers of America v. Lorain, a Division of Koehring Co.*, 616 F.2d 919, in its effort to create the impression of a "circuit conflict." In *Lorain*, the court did not find that the union officers had ratified the strike for not disciplining its members because, unlike the case at bar, no disciplinary procedures were available to the union during the strike. *See Airco Speer*, 494 F. Supp. at 878.

Thus, it is clear that the Fourth Circuit's ratification finding is not in conflict with decisions of other circuit courts. Furthermore, the Fourth Circuit's finding of ratification is amply supported by uncontested evidence adduced at trial. Thus, because the common-law agency theory of local union liability is entirely independent and separate from the mass action theory, irrespective of any perceived conflict among the circuits on the mass action issue, the Fourth Circuit's decision below should stand. It is simply unnecessary to address the mass action issue because the Fourth Circuit is so clearly correct in its resolution of the fact-oriented ratification issue.

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[13] For cases from other circuits stating that liability may be imposed on a local union for ratifying the wildcat activity of its members, *see, e.g., Davis Co. v. United Furniture Workers of America*, 674 F.2d 557; *Seattle Times Co. v. Seattle Mailer's Union No. 32*, 664 F.2d 1366 (9th Cir. 1982); *California Trucking Association v. Brotherhood of Teamsters, Local 70*, 679 F.2d 1275.

CONCLUSION

For the reasons herein expressed, respondent Consolidation Coal Company respectfully requests the Court to deny the petition of Local 1702, United Mine Workers of America, for a writ of certiorari.

Respectfully submitted,

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